delivery of complete vacant possession of the said land. Now vacant possession had already been given to the purchasers and according to Haji Ahmad Sobri in his affidavit the purchasers had started to build houses on the said land. The plaintiffs are yet to receive the balance of the purchase price of $435,305.20.

The undertaking has not become impossible of performance. The defendants can obtain the banker's guarantee from any bank. It can still be expressed to be payable upon delivery of vacant possession of the said land, but since vacant possession had already been given the guarantee can be crystallized forthwith.

The matter is not a fit and proper case for summary enforcement

In *Silver & Drake* v *Baines*[7] Lord Denning MR said:

> This court has from time immemorial exercised a summary jurisdiction over solicitors. They are officers of the court and are answerable to the court for anything that goes wrong in the execution of their office. Even if the solicitor has been guilty of no fault personally but it is the fault of his clerk, he is accountable for it. This jurisdiction extends so far that if a solicitor gives an undertaking in his capacity as a solicitor the court may order him straightaway to perform his undertaking. It need not be an undertaking to the court. Nor need it be given in connection with legal proceedings. It may be a simple undertaking to pay money, provided always it is given 'in his capacity as a solicitor'. If such an undertaking is given, the court may summarily make an order on the solicitor to fulfil his undertaking ... This summary jurisdiction means, however, that the solicitor is deprived of the advantages which ordinarily avail a defendant on a trial. There are no pleadings; no discovery; and no oral evidence, save by leave. The jurisdiction should, therefore, only be exercised in a clear case.

Counsel for the defendants had submitted that the matter ought not be dealt with summarily as there are issues which should go for trial. Apart from the issues which I have already dealt with there was the issue that the Alor Setar branch of the defendant firm was a separate entity and that the branch office had been sold to others. In my view the sale of the branch office did not affect the liability of the defendants. The liability had already incurred and the defendants would continue to be liable to the plaintiffs despite the sale. The private arrangement among the partners of the defendant firm as to their respective interests in the firm and in the branch also does not affect the liability of the defendants on the undertaking. It is for the partners themselves to determine who among them should bear the liability. It is not for the court to determine the issue on this application to enforce the undertaking.

It is my finding that this is an appropriate case for which summary jurisdiction can be exercised. I have already held that the defendants' undertaking was clear, unqualified and unequivocal, that it was clearly within the ordinary course of a solicitor's business and that Yaacob had the ostensible authority to give the undertaking. On the evidence before me I am satisfied that the case against the defendants had been clearly established (see *John Fox* v *Bannister King & Rigbeys*[3]).

For the above reasons I allowed the plaintiffs' application in terms of the originating summons and costs.

Application allowed.

Solicitors: *Nijar and Nijar*; *Tan, Yu & Co*; *Sri Ram Zulkifly & Kumar.*

Reported by *Yap Shao Sin*

Toh Seak Keng v Lim Huang Cheow & Ors (Toh Seow Ngan & Ors, Interveners)

Toh Seow Ngan & Ors v Toh Seak Keng & Ors

HIGH COURT (KUALA LUMPUR) – ORIGINATING PETITION NO C2 OF 1982 & SUIT NO C4-22-295-86
VC GEORGE J
1 APRIL 1989

Civil Procedure – Consent order – Order affecting strangers to action – Proceedings to set aside consent order unsuccessfully brought by party – Strangers to action supporting such proceedings – Strangers commencing separate action to set aside consent order – Whether estopped by their conduct in previous proceedings

One Toh Seak Keng, a director of a company, brought Originating Petition No C2/82 pursuant to s 181 of the Companies Act 1965 against some of his fellow directors who were the first, second and third respondents and seeking, inter alia, an order that those respondents purchase his shares in the company. The petitioner was absent at the hearing of the petition but his counsel was present. Counsel for the petitioner and counsel for the respondents recorded a consent order before the judge by the terms of which the first and second respondents were ordered to purchase 390,000 shares in the company registered in the name of the petitioner and in the names of various members of his family at the price of $1.90 per share. Of the shares, only 140,000 were registered in the name of the petitioner. The rest of the shares were held in lots of 50,000 in the name of each of five different members of his family.

The petitioner later applied for an order, inter alia, that the consent order be set aside, alleging that he had never instructed counsel to consent to the sale of the shares. He also said that the consent order affected not only him but members of his family in respect of their own shareholdings in respect of which they had not given instructions and further that they were not parties to the petition. The application was dismissed apparently, inter alia, because the order had already been perfected when the application came on for hearing and accordingly could not be set aside at the instance of only one of the parties. The petitioner did not appeal against the decision but commenced

Civil Suit C2169/85 making the respondents in the petition defendants and seeking an order that the consent order be set aside. On the application of the defendants, the writ was struck off by order of Zakaria Yatim J who thought that the claim was frivolous, vexatious and an abuse of the process of the court. The appeal against that decision was dismissed by the Supreme Court.

In the meantime, the petitioner had taken out an application in the petition seeking a stay of the execution of the consent order pending the disposal of Civil Suit No C2169 of 1985. The members of the petitioner's family were also granted leave to intervene in the proceedings relating to the petition.

After the dismissal of the appeal, the said five members of the petitioner's family commenced Suit No 22-295-86 against the petitioner and the respondents to the petition seeking an order that the consent order, to the extent that it affected them, be set aside. The petitioner, who was the first defendant, did not appear to the writ. Counsel for the other defendants contended that the plaintiffs were estopped by their conduct from challenging the validity of the consent order.

Held, dismissing the suit:

The plaintiffs in Civil Suit 22-295-86 went beyond just standing by and watching the issues fought out in Civil Suit C 2169 of 1985. It seemed clear that they and each of them had directed their minds to the need to have the consent order set aside and had decided initially that the vehicle for obtaining that desired result need only be the application by the petitioner in the petition and, when that failed, Civil Suit C 2169 of 1985 brought by the petitioner as plaintiff. There was clearly the intention to use those proceedings and there was active participation by them in each of those proceedings in the affirming of those affidavits by which they had moved the court for the desired result. The similar interest that the petitioner and the said members of his family had were not the shares but having the consent order set aside. The plaintiffs in Civil Suit 22-295-86 were estopped by their previous conduct from now challenging the validity of the consent order by the vehicle of Civil Suit 22-295-86.

Cases referred to

1 *Abuakwa* v *Adanse* [1957] 3 All ER 559 (folld)
2 *Yat Hung Investment Co Ltd* v *Dao Heng Bank Ltd* [1975] AC 581 (folld)
3 *Henderson* v *Henderson* (1843) 3 Hare 100; 67 ER 313 (folld)
4 *Osborne* v *Smith* [1960] 3 ALJR 368 (folld)
5 *Ee Kim Kin* v *Collector of Land Revenue* [1967] 2 MLJ 89 (folld)

Legislation referred to

Companies Act 1965 s 181
Rules of the High Court 1980 O 18, r 19

In Originating Petition No C2 of 1982:

JS Tan (Miss) for the petitioner.
S Selvarajah for the respondents.
SC Loh for the interveners.

In Civil Suit No C4-22-295-86:

SC Loh for the plaintiff.
S Selvarajah for the second, third, fourth and fifth defendants.

Cur Adv Vult

VC George J: By originating petition No C2/82 brought pursuant to s 181 of the Companies Act 1965 Toh Seak Keng as a minority shareholder in Yew Lee Feed-mills Sdn Bhd set out a number of complaints against some of his fellow directors who are the first, second and third respondents to the petition and prayed for an order, inter alia, that those respondents purchase his shares in the company. When the petition came on for hearing on 3 October 1983 the petitioner was absent. However, counsel for the petitioner was present and he and counsel for the respondents appeared before the judge and had recorded a consent order by the terms of which it was ordered that the first and second respondents purchase 390,000 shares in the company registered in the name of the petitioner and in the name of various members of his family at the price of $1.90 only per share. Of this lot of shares only 140,000 were registered in the name of the petitioner. The rest of the shares were held in lots of 50,000 in the name of each of five different members of the petitioner's family.

On 17 December 1984 the petitioner took out an application in the said petition seeking for an order that the consent order be set aside and for certain other reliefs. This application was supported by the petitioner's affidavit. The petitioner stated that he had never given instructions to his counsel to consent to the sale of the shares. He also pointed out that the orders affected not only him but members of his family in relation to their own shareholdings in respect of which they had not given instructions and he particularly pointed out that they were not parties to the petition.

The said five members of the petitioner's family who are his wife and four sons affirmed an affidavit which was filed in support of the petitioner's said application. Inter alia, they confirmed that in fact each of them were registered owners of 50,000 of the shares of the company, the subject of the consent order and that they had never given instructions for any order to be made in respect of their shares and ended their affidavit thus:

> Wherefore we humbly pray that this honourable court may be pleased to set aside the said order or alternatively the execution of the order dated 3 October 1983 be stayed.

When the application came on for hearing it was dismissed with costs apparently, inter alia, because the judgment had been perfected and accordingly could not be set aside at the instance of only one of the parties in the action in which the order had been made. The petitioner appeared to have accepted the decision of the court. He certainly did not appeal against the decision but proceeded to file a civil suit being CS C2169/85 making the respondents in the petition defendants and seeking for an order that the consent order of 3 October 1983 be set aside. The ground relied on for the claim was that counsel for the petitioner had acted without the authority of

the petitioner when he obtained the consent order. This writ was caused to be issued on 27 April 1985, just over two weeks after the application to set aside taken out in the petition had been dismissed.

The defendants in the civil suit took out an application invoking O 18 r 19 to have the writ set aside and the action struck off. They contended that the averments in the statement of claim and the prayers sought in the statement of claim were identical to the said application of 17 December 1984 that had been brought in the petition which application had been dismissed with costs. They contended that in the premises the plaintiffs were 'estopped per rem judicatur' from raising the same averments and asking for the same remedy that had been raised and asked for in the said application. They went on to contend that the plaintiffs had no cause of action or alternatively had not disclosed 'any valid or justiciable cause of action'. The defendants also contended that the action by the plaintiffs was frivolous, vexatious and abuse of the process of court.

The application was heard by Zakaria Yatim J. He was of the opinion that the claim filed by the plaintiffs was frivolous, vexatious and an abuse of the process of the court. On 25 March 1986 he ordered that the writ be struck off with costs. The appeal against this decision was dismissed by the Supreme Court on 30 July 1986. Now, pending the disposal of the said Civil Suit C2169-85 the petitioner had on 9 December 1985 taken out an application in the Originating Petition No C2/82 seeking a stay of the execution of the consent order of 3 October 1983 until the determination of the civil suit (by which it was hoped that the consent order would be set aside). The said five members of the petitioner's family again supported him in the application for stay pending disposal of the civil suit which support was manifested by a joint affidavit sworn by them in which they make reference to the said civil suit filed by the plaintiffs which affidavit they ended thus:

> 6 There is also a fresh action vide KL HC Civil Suit No C2169/85 to set aside the consent order entered by mistake and we are advised and firmly believe that we have a fair chance of success.
> 7 We humbly pray that this court may be pleased to stay the execution of this order dated 3 October 1983.

Also on 9 December 1985 the said members of the family of the plaintiffs took out a summons-in-chambers in the originating petition seeking leave to intervene in the proceedings. The court granted them leave to intervene. It was some five months after the Supreme Court had dismissed the appeal against the judgment of Zakariaa Yatim J that the five members of the petitioner's family caused their writ 22-295-86 to issue seeking for the consent order, to the extent that it affected them, to be set aside.

The first defendant in this action is Toh Seak Keng the petitioner in Originating Petition No C2/82. Predictably he appears to have ignored the writ. The other defendants are the respondents in the petition. They filed a statement of defence and for the various reasons set out therein they asked for the plaintiffs' claim to be dismissed with costs. Eventually the application for execution of the consent order of 3 October 1983 (encl (58) in the originating petition) and the Civil Suit No 22-295-86 were consolidated and by consent directions were given for both matters to be disposed of by the trial of the civil suit and for consequential orders to be made in respect of both civil suit and encl (58) in the petition. It was also by consent directed that at the trial affidavits filed in both the matters could be read and if necessary the testimony of witnesses could be taken.

When the consolidated matters came on for hearing learned counsel for both sides most helpfully suggested that the matter be resolved on a preliminary issue, namely, whether the plaintiffs in Civil Suit No 22-295-86, that is, the members of the family of the petitioner Toh Seak Keng, are estopped from challenging the validity of the consent order of 3 October 1983. Counsel for the defendants quite properly conceded that when the consent order was made the court in fact had no jurisdiction to make an order binding on the plaintiffs in that they were not parties in those proceedings, that is Originating Petition No C2/82. Accordingly counsel on both sides have agreed with my approbation that if the court holds that the plaintiffs in Civil Suit 22-295-86 are estopped from challenging the validity of the consent order the consequential order to be made would be that the civil suit be dismissed with costs and for an order in terms to be given in respect of the application for execution of the transfer of shares, ie encl (58) in the Originating Petition No C2/82. If, on the other hand, the court is of the opinion that the plaintiffs are not estopped, then, because of the concession in respect of the jurisdiction, it would follow that the consent order in so far as it affects the plaintiffs in CS No 22-295-86 would be set aside with costs.

Encik S Selvarajah of counsel for the second to fifth defendants (the respondents in the petition) relied on *Abuakwa* v *Adanse*,[1] the decision of the Privy Council in respect of a West African (as it then was) case to submit that the plaintiffs were estopped from challenging the validity of the consent order. The judgement of the Board was read by Lord Denning in the course of which he said:

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence; but this general rule admits of two exceptions. One exception is that a person who is in privity with the parties, a 'privy' as he is called, is bound equally with the parties, in which case he is estopped by res

judicata; the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct.

Encik Selvarajah relied on estoppel by conduct. He contends that the plaintiffs are estopped from seeking to have the consent order set aside for the very reasons that estoppel was successfully invoked in the West African case, that is to say:

1 there was an active participation by them in previous proceedings;
2 taking an active benefit from the judgment in the previous proceedings; and in any event
3 standing by and watching the issues fought out or at least giving evidence in support of the said petitioner both in the Petition C2 of 1982 and in Civil Suit No C2169 of 1985. (See p 561 E,F&G of *Abuakwa* v *Adanse*).

Encik SC Loh of counsel for the plaintiffs contended that *Abuakwa* v *Adanse* is distinguishable; 1) on the facts, and 2) it was based on a custom peculiar to and prevalent in that part of Africa in respect of which custom judicial decisions had given legal sanction. He contended that it was significant and made all the difference that in the African case each of the parties appeared to have an undivided interest in the lands the subject of the suit, whereas in the instant case each of the plaintiffs had parcels of the shares of 50,000 each in their respective names separate and distinct from the petitioner's 140,000 shares. He contended that the plaintiffs here had not benefited from previous orders made. He contended that there had not been active participation in the previous proceedings on the part of these plaintiffs. He contended that because the petitioner's 140,000 shares were separate from each lot of 50,000 shares owned by each of the plaintiffs the court should hold that the interest of the plaintiffs and that of the petitioner were not the same and therefore raising estoppel is misconceived. In his submission, there was no evidence of conduct on the part of the plaintiffs relevant for estoppel to be invoked. He contended that the plaintiffs had no interest in the suit filed by the petitioner and the fact that they had affirmed the two affidavits was because they were naturally interested in the petitioner's application to set aside because he was the father of four of them and the husband of the fifth of them. This, it was contended, per se did not provide estoppel by conduct. Encik Loh finally contended that the petitioner's suit seeking to have the consent order set aside was on an O 18 r 19 application and was based on lack of instructions and although it was dismissed there is nothing to stop him from filing a fresh suit this time based on, say, mistake. He contended that if the petitioner could do that, the right of the plaintiffs in CS C22-295-86 to file the action based on mistake (and other grounds) is even more so.

In reply Encik Selvarajah referred, inter alia, to *Yat Hung Investment Co Ltd* v *Dao Heng Bank Ltd*[2] at p 590 where the Privy Council stated:

> But there is a wider sense in which the doctrine may be applied to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram VC in *Henderson* v *Henderson*[3] at p 115 where the judge says:
>
> '...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

In my judgment there is no running away from the fact that there were previous proceedings to set aside the consent order of 3 October 1983, namely, the original application to set aside the consent order taken out by Toh Seak Keng in his petition as well as the writ C2169-85 caused to be issued by Toh Seak Keng. The ground relied on in the former of those proceedings was that the consent order was obtained without instruction from the petitioner and on the basis that it contained 'many errors and mistakes, for example, family members were included in the order who were not named parties in the action. As such they cannot give instructions'. In the latter, the cause of action was that counsel for the petitioner acted without the authority of the petitioner entering into the consent judgment.

On the strength of the rule set out in the passage taken from *Henderson* v *Henderson*[3] and which was, as has been seen, applied in *Yat Hung Investment Co Ltd* v *Dao Heng Bank Ltd*[2] I have to disagree with Encik SC Loh's contention that it is open to Toh Seak Keng to file a fresh action seeking to have the consent order set aside on grounds not pleaded in his earlier action. Toh Seak Keng should have brought forward his whole case and not having done so he will not be permitted to open the same subject of litigation in matters which could have been brought up for adjudication in the previous proceedings but were not. Now, even if Toh Seak Keng is estopped from doing so are the plaintiffs in CS 22-295-86 estopped?

In my judgment the plaintiffs in CS 22-295-86 went beyond just standing by and watching the issues fought

out in CS C2169-85 (which alone according to Lord Denning is sufficient to successfully raise estoppel by conduct). It seems to me clear that they and each of them had directed their minds to the need to have the consent order set aside and had decided initially that the vehicle for obtaining that desired result need only be the application by Toh Seak Keng in the petition and when that failed the Civil Suit C2169-85 was brought by Toh Seak Keng as plaintiff. There was clearly the intention to use those proceedings and there was active participation by them in each of those proceedings in the affirming of those affidavits by which they moved the court for the desired result. The similar interest that Toh Seak Keng and the said members of his family had were not the shares but having the consent order set aside. The principles in respect of estoppel by conduct set out in *Abuakwa* v *Adanse*[1] are of universal application and has been applied in Australia (*Osborne* v *Smith*[4]) and in Malaysia (*Ee Kim Kin* v *CLR*[5] at p 90).

Applying those principles to the facts of the case I am of the opinion that the plaintiffs in the instant Civil Suit 22-295-86 are estopped by their previous conduct from now challenging the validity of the consent order by the vehicle of the Civil Suit 22-295-86. Accordingly on the basis of what had been agreed it follows that the said civil suit has to be dismissed with costs. There will be such an order and there will be the necessary consequential orders.

Application dismissed.

Solicitors: *Low Hop Bing & Associates*; *Fernandez & Co*; *Cheang & Ariff.*

Reported by *PS Ranjan*

Development & Commercial Bank Bhd v Cheah Theam Swee

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C2575 OF 1984
ZAKARIA YATIM J
1 MARCH 1989

Civil Procedure – Judgment in default – Setting aside – Summary judgment – Admission of debt by defendant alleged – Defendant and his counsel absent at hearing of application for summary judgment – Judgment entered – No satisfactory explanation for absence – Merits of defence – Whether trial necessary – Rules of the High Court 1980, O 13 r 9 & O 14

Statutory Interpretation – Subsidiary legislation – Order issued – Not published in government gazette – Whether publication necessary – Whether order constitutes subsidiary legislation – Exchange Control Act 1953, ss 8, 39(2) & 43(2) – Interpretation Act 1967, s 2

The plaintiffs, a bank in Malaysia, issued a writ of summons against the defendant for the repayment of debts in Malaysian currency said to be owed by the defendant. It was averred in the statement of claim that in a letter to the plaintiffs' solicitors the defendant had admitted liability to repay the sums owing. Neither the defendant nor his counsel appeared at the hearing of the plaintiffs' application for summary judgment under O 14 of the Rules of the High Court 1980 and hence the senior assistant registrar granted leave to the plaintiffs to enter judgment against the defendant. The defendant applied for an order to set aside the judgment. In his affidavit in support of the application he said that he had understood certain letters from the plaintiffs to mean that the plaintiffs would realize certain securities in order to satisfy their claim and that they could not levy execution against him on any judgment or order given in the suit and therefore he did not instruct his then solicitors to file papers or to appear before the senior assistant registrar in the summary judgment proceedings. It was conceded for the defendant that he had made a mistake in drawing inferences from the plaintiffs' letters. The defendant contended that at the time that the loan was granted he was a permanent resident of Singapore and that the loan was granted without the permission of the Controller of Foreign Exchange of Malaysia in contravention of s 8 of the Exchange Control Act 1953. The defendant was a citizen of Malaysia at the material time and in his application for the loan gave as his 'present address' an address in Kuala Lumpur and another in Singapore.

The plaintiffs relied on certain exchange control notices issued by the Controller of Foreign Exchange which they said made it clear that for the purpose of s 8 of the Act a citizen of Malaysia was resident in Malaysia. It was contended for the defendant that the Controller had not given directions that for all purposes of the Act a citizen of Malaysia was to be treated as a resident of Malaysia and further that there was no exchange control notice providing that a citizen of Malaysia was to be treated as a resident of Malaysia for the purpose of a grant of a loan in Malaysian currency by a bank in Malaysia. It was also contended for the defendant that the notices were inadmissible and did not constitute orders or statutory instruments or subsidiary legislation and that the notices were not signed by the authorized officer. It was said that the notices did not indicate under which provision of the Act they were issued and it was alleged that they were not published in the government gazette.

Held, allowing the defendant's application:

(1) The court will have to be fully satisfied why the defendant was absent at the hearing of the O 14 application. The defendant had failed to give a satisfactory explanation for his absence at the hearing. Since the defendant was a lawyer he should know what an O 14 application was and he should know the consequences if he or his solicitors did not attend the hearing of the application. To dismiss the defendant's application on this ground was too drastic. The case was only at the O 14 stage. There had been no trial and no judgment on the merits. If the defendant failed to explain satisfactorily his absence at the hearing, the court could order him to pay costs to the plaintiffs if he succeeded in setting aside the judgment.

(2) As the judgment obtained was a regular judgment, the defendant had to produce to the court evidence that he had a defence containing merits.

(3) The question of where the defendant was resident at the material time was an issue which could only be decided at the trial.

(4) The notices issued by the Controller did not apply to the instant case as the notices either related to loans in foreign currency to residents of Malaysia or to the prohibition against the opening of external accounts by citizens of Malaysia. The question of construction of the notices should be decided at the